Supreme Court, U.S.
FILED
JUL 2 1999
CLERK

No. 98-1920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

IN THE MATTER OF THE MINOR CHILD K.A.H.
D.O.B. 9/21/85

S.H.,

Petitioner.

On Petition for Writ Of Certiorari to the Supreme Court of the State of Alaska

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

MARK S. MANDELL, ESQ.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President, The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE, ESQ.*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae
**Counsel of Record*

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITION

IDENTITY AND INTEREST OF AMICUS CURIAE

ATLA is a national voluntary bar association whose approximately 50,000 members primarily represent plaintiffs in personal injury suits, civil rights and employment rights cases, and commercial litigation.[1] Letters of consent of the parties to the filing of this brief have been filed with the Clerk of this Court.

This case is of great importance to ATLA, its members and their clients. The desperate situation faced by the young

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

girl and her family in this case is familiar to ATLA members in every part of the country. So is the ethical dilemma faced by the girl's attorney. Every day, trial lawyers represent Americans who have been seriously injured because of a defendant's negligence. Loss of income, mounting medical bills and the necessities of food, clothing and shelter place these families under enormous stress. The very defendants who placed these families in dire straits can exploit their advantage and pressure to settle their meritorious claims for inadequate amounts.

In these circumstances, ATLA believes that an attorney who advances money to tide the client over until the claim is resolved advances the cause of justice. That such an attorney would be deemed guilty of unethical conduct is, in ATLA's view, unconscionable. ATLA has long criticized the American Bar Association position, adopted in 1953 and followed by many states, which condemns attorneys who make such humanitarian loans to clients. ATLA believes that enforcement of this rule violates Americans' constitutional right of access to the courts and the due process rights of attorneys.

REASONS FOR GRANTING THE WRIT

I. STATEMENT OF THE CASE.

The facts in this case, summarized by the Alaska Supreme Court, *In re KAH*, 967 P.2d 91 (Alaska 1998), and set forth in detail in the Appellant's brief in that Court [Alaska App. Br.], spotlight the important constitutional issues which ATLA urges this Court to address.

K.A.H was seven years old in 1993 when her father was killed. P.K.H. was a 34-year-old merchant seaman on a commercial crab vessel fishing hear St. Paul Island, Alaska. He was struck by a 200-pound steel davit. (The davit was part of the hydraulic longline fishing gear. Triangular in shape and attached to the side of the vessel, the davit held the line away from the vessel.) He suffered four broken ribs that

punctured both lungs. P.K.H. died slowly aboard the vessel following six hours of excruciating pain. (Alaska App. Br. at 3-4).[2]

K.A.H's mother, S.H., retained Gerald W. Markham, an attorney highly qualified and experienced in litigating on behalf of injured seamen and their families (Alaska App. Br. at 7 n.15). In August, 1993, S.H. was appointed the personal representative of P.K.H.'s estate. Markham then instituted a wrongful death and survival action against under the Jones Act, 46 U.S.C. §688 (1975 & Supp. 1998) for the benefit of K.A.H. as P.K.H.'s sole heir and wrongful death beneficiary. (Pet. at A-2).

The tragic death of K.A.H's father left the family in bleak financial condition, with few resources to meet even the barest necessities of life. By summer 1994, K.A.H and her mother had been evicted from their home and were living in a parked car. (Pet. at A-3) Seeing the family's desperate circumstances, Markham arranged to loan small sums amounting to several hundred dollars at no interest to S.H. on condition that the loans be repaid from the proceeds of the wrongful death recovery. (Alaska App. Br. at 11) Markham also persuaded S.H.'s father in Wisconsin to take them in. (*Id.* at 12). December, 1994, S.H. was needed in Alaska for deposition and to assist in preparing the case. Markham arranged a loan for airfare from Wisconsin and rent for an apartment in Kodiak. (Pet. at A-3) As the case dragged on into 1995, Markham arranged for an additional loan of $1,000. (*Id.*)

Preparation and negotiation in the case continued for about two years, during which defendant made an offer of $175,000, which was deemed inadequate. Defendant interpleaded the manufacturer of the fishing gear, which did not defeat plaintiff's unseaworthiness claim but added greatly

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[2] The Jones Act permits a survival action for recovery for predeath pain and suffering in addition to pecuniary loss and loss of support. See Steven F. Friedell, ed., Benedict on Admiralty ch. 81(c) (1998).

to the volume and complexity of the pretrial work and delayed trial. (Alaska App. Br. at 10)

Following mediation, the suit was eventually settled for $665,000. S.H sought approval of the settlement on behalf of the minor child. The standing master approved the amount of Markham's one-third contingency fee, litigation costs, and reimbursement of the advance to S.H. of airfare from Wisconsin. (Pet. at A-3-4).

In a demonstration that "no good deed goes unpunished," the master refused to approve reimbursement of loans for living expenses, amounting to approximately $1,900 as violating Alaska Rule of Professional Responsibility 1.8(e).[3] (Alaska App. Br. at 20-21). The superior court upheld the master's determination and the Alaska Supreme Court affirmed, holding that the rule does not deny or impede access to the courts under the state or federal constitution. (Pet. at A-2).

II. THE ALASKA SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH THIS COURT SHOULD DECIDE.

ATLA respectfully submits that Alaska Rule of Professional Conduct 1.8(e) as applied by the court below to prohibit attorneys from making loans to existing clients to meet living expenses, impermissibly burdens the right of access to the courts. Similar rules are in effect in a majority of states and affect a great number of potential litigants. Because of the importance of this federal constitutional issue,

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[3] RULE 1.8 Conflict of Interest: Prohibited Transactions

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

ATLA urges the Court to grant the petition the decide whether the prohibition is invalid under the Due Process Clause of the Fourteenth Amendment and the Petition Clause of the First Amendment.

A. Ethical Prohibitions Against Humanitarian Loans to Clients Undermine Access to the Courts for Many Americans

An injured person seeking legal redress against a corporate defendant and its liability insurer is often a David facing Goliath. In this contest, however, time is not even-handed. Corporate Goliaths possess deep pockets, a cadre of counsel paid by the hour, and immunity from the exigencies of food, shelter, and other necessities that press so heavily on human parties. Indeed, the money that might ultimately be awarded in compensation to the injured plaintiff earns interest for the company while the litigation proceeds.

David, on the other hand, is often standing in quicksand. Medical bills mount as other living expenses continue. If plaintiff is a breadwinner who cannot earn a living because of his or her injury, the family will be overwhelmed all the more quickly. These plaintiffs are vulnerable to pressure to settle their claims for woefully inadequate amounts to meet their immediate needs. To exploit this vulnerability, defendants need only drag out the litigation process. In these circumstances, the defendant's most potent weapon is neither truth nor justice, but the mere passage of time.

At common law and throughout most of American judicial history, attorneys representing injured plaintiffs have advanced money or guaranteed loans to injured clients to enable them to keep the wolves from the door until their claims are resolved. One commentator summarized the state of the law as follows:

> Prior to 1955, the relatively few cases concerning the propriety of loans for living expenses produced a reasonably clear and consistent rule. According to these cases, an attorney acts improperly only if he offers

> money to a potential client as an inducement for employment . . . Otherwise, the courts favored loans for living expenses, recognizing that with them clients might withstand unjust settlement offers they would otherwise accept out of necessity.

William Robert Strelow, *Loans to Clients for Living Expenses,* 55 Calif. L. Rev. 1418, 1421-22 (1967).

Courts have long recognized that the practice of extending humanitarian loans to clients serves to safeguard access to justice for many who are most in need of it. In a leading decision, the Illinois Supreme Court stated:

> It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. . . . The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that it is against public policy or any sound reason why it should be so considered.

In re McCallum, 341 Ill. 578, 589, 173 N.E. 827, 831 (Ill. 1930). *See also Johnson v. Great Northern Ry.*, 128 Minn. 365, 369, 1151 N.W.2d 125, 127 (1915)("It is not against public policy for an attorney to loan his client money to enable him to carry on the suit."); *In re Sizer*, 306 Mo. 356, 375, 267 S.W. 922, 928 (1924)(similar).

Nor are these concerns limited to society's poorest members. In modern America, a serious injury can spell disaster for middle class families, undermining their legal protections at the time they are needed most. It is true that in America, "while everyone can afford to get to the courthouse, the real benefits of our justice system are reserved for the fortunate few who can afford to stay." John J. Vassen, *The*

Case for Allowing Lawyers to Advance Client Living Expenses, 80 Ill. B.J. 16 (1992).

1954 marked a turning point in the bar's view of humanitarian loans to clients. In that year, the American Bar Association Committee on Ethics and Grievances issued a Formal Opinion which took the position that advancing living expenses violated the Canons of Ethics.[4]

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[4] ABA Committee on Professional Ethics and Grievances, Formal Opinion 288 (Oct. 11, 1954):

The opinion of the committee was stated by the Chairman and concurred in by all members of the Committee.

Canon 42, entitled "Expenses of Litigation" is as follows: A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

Canon 10, entitled "Acquiring an Interest in Litigation" is as follows: The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

For a lawyer to make advances to an injured client to cover subsistance for him and for the members of his family while the case is pending, does not constitute the advancement of expenses, the latter term referring to court costs, witness fees and expenses resulting from the conduct of the litigation itself, and not expenses unconnected with the litigation, although resulting from the accident.

For a lawyer to advance such living costs is similar to making an advance on account of the prospective verdict. Clearly there is no expectation of reimbursement except out of the verdict. Accordingly, a lawyer who makes such advances acquires thereby an interest in the subject matter of the litigation which he is conducting, in violation of Canon 10. We have read the opinion of the Supreme Court of Illinois in People v. McCallum, 173 N.E. 827, 830-1 (1930), in which it is stated that the advancement of living expenses by a lawyer is contemplated and justifiable under Canon 42. We are not convinced by the reasoning of the majority of the Court on this issue, and are of the opinion that Canon 42 furnishes no justification for such advances.

The proposed practice also would violate Canon 6, precluding a lawyer from representing conflicting interests, and imposing upon the lawyer the duty to represent his client with undivided fidelity. While, as pointed out by Professor Cheatham in his Case Book, Page 170 n., there is an inescapable conflict of interest between the attorney and his client with regard to counsel fees, this conflict of interest need not and should not be extended to permit the lawyer to acquire an additional stake in the outcome of the suit which might lead him to consider his own recovery

The president of the National Association of Compensation Claimants Attorneys (which later became ATLA) published an article condemning the Opinion. Payne H. Ratner, *Advancing Money to Clients - Whether Unethical*, 15 NACCA L.J. 410 (1955). The Kansas Bar subsequently sought to disbar Ratner, on charges that included arranging loans to injured railroad workers who were clients. The Kansas Supreme Court dismissed the charges noting:

> 'It has never been held violative of law or public policy to give financial aid to a poor suitor who is prosecuting a meritorious cause of action. . . . The law does not tolerate the notion that a powerful defendant may force the abandonment of a suit whenever he is able to exhaust the slender means of a weak antagonist.'

In re Ratner, 399 P.2d 865, 874 (Kan. 1965), quoting *Jahn v. Champagne Lumber Co.*, 157 F. 407 (7th Cir. 1908).

Nevertheless, the ABA position against advancing client expenses was incorporated into DR5-103(B) of the Model Code and then into 1.8(e) of the Model Rules. The ABA imprimatur was sufficient to persuade the great majority of states to adopt these rules for the governance of their bars. Amicus suggests, however, that many of these states did so without close examination of this provision and its ramifications.

No precise figures are available, but the practice of advancing living expenses for humanitarian reasons

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rather than that of his client, and to accept a settlement which might take care of his own interest in the verdict but not advance the interest of his client to the maximum degree. Such an extension would be inconsistent with the lawyer's duty of undivided fidelity to this client.

Finally, the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him, in addition to the assurance of performing legal services for the client (See Canon 27).

Accordingly, we are of the opinion that the activity with respect to which an opinion has been requested would constitute a clear violation of the Canons of Professional Ethics.

continues to be widely regarded as very common, if clandestine. Strelow, *supra*, at 1419; Bruce A. Green, *Lawyer Discipline: Conscientious Avoidance, and Prosecutorial Discretion*, 66 Fordham L. Rev. 1307, 1308 n.6 (1998).

Eight jurisdictions have, on reflection, rejected the ABA position against advancing living expenses to existing clients.[5]

Louisiana has done so through judicial decision. In *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976), the court explicitly recognized that when an attorney is forbidden to assist an injured client with living expenses, the client "may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount." *Id.* at 446. The court concluded that the state's ethics rule forbidding such humanitarian loans "

> places an unreasonable burden upon an individual's right to enforce claims allowed him by law might be deemed violative of the access to courts guaranteed to all our people by our state constitution."

Id.

B. The Prohibition of Advancing Living Expenses to Client Infringes the Right of Access to the Courts Under the Due Process Clause.

Amicus submits that prohibiting such advances impinges upon the fundamental right of access to justice. The

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[5]Alabama Rule of Professional Conduct 1.8(e)(3); California Rule of Professional Conduct 4-210(A)(1) & (2) (1993); District of Columbia Rule of Professional Conduct 1.8(d)(2)(1992); Minnesota: Rule of Professional Conduct 1.8(e)(3)(1992); Montana Rule of Professional Conduct 1.8(e)(3); North Dakota Rules of Professional Conduct 1.8(e); Texas Disciplinary Rule of Professional Conduct 1.08(d)(1); Vermont Code of Professional Responsibility DR 5-103(B).

prohibition cannot withstand strict scrutiny -- indeed, the rationale of the prohibition does not even pass muster under the minimal rational basis test.

Long ago, the Court located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885). More recently, the Court reiterated that the "right of access to the courts . . . is founded in the Due Process Clause." *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974). *See also Bounds v. Smith,* 430 U.S. 817 (1977).

The Court has been particularly vigilant against state rules that would deny access to the courts to those of limited financial means. For example, in *Boddie v. Connecticut,* 410 U.S. 371, 375-76 (1971), the Court struck down a state law that conditioned a judicial decree of divorce on the party's ability to pay costs.

However, this Court has not had occasion to define the scope of the right enunciated in *Boddie.* The uncertainty is dramatically illustrated in the present case. Previously, the Alaska Supreme Court in *Bush v. Reid,* 516 P.2d 1215 (Alaska 1973), had held that a parolee could not be denied access to the civil courts to seek compensation for personal injuries arising out of an auto accident:

> [U]pon reflection we conclude that the denial of access to the civil courts rends the fabric of justice as surely here as in *Boddie.*
>
> Although the collision of automobiles results in a dispute at first subject to private resolution, often the reconciliation of competing interests may be accomplished only by resort to the formal judicial process. The state exercises a monopoly over that paramount process where the "private structuring of individual relationships and repair of their breach" has failed.

Id. at 1218. The court added that "the denial of access to the courts creates an unfair leverage in the potential defendant who may avoid or reduce a meritorious claim because the ordinarily penurious state of the parolee dictates an early settlement on whatever terms are available." *Id.* at 1219.

K.A.H's case would appear to present an even more clear-cut example of a state monopoly over the legal process, since even an out-of-court settlement on behalf of the minor child required court approval. (See Pet. at 2-3). Nevertheless, the Alaska court in this case afforded a much more narrow interpretation of this Court's decision in *Boddie*, finding it inapposite. (Pet. at A-9-11).

ATLA submits that this Court should grant the petition to clarify the scope of the due process right of access to the courts.

C. The Prohibition of Advancing Living Expenses to Client Infringes the Right of Petition Under the First Amendment.

This Court has also held that the "right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)("[T]he right of access to the courts is indeed but one aspect of the right of petition.").

This Court has also relied on the First Amendment to invalidate attempts by state bars to enforce ethical rules that limit access to justice for those with limited resources. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), the Virginia State Bar had obtained an injunction against the union's plan to provide counsel to injured workers. The Court struck down the injunction. Because the union's activity was the object of the injunction, the Court's analysis focused on the First Amendment association rights of the union members. The Court made clear, however, that the right to petition was also implicated:

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. . . . The right to petition the courts cannot be so handicapped."

377 U.S. at 7. In *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971), the Court invalidated a similar injunction, one provision of which prohibited the union from representing that the attorney would "defray expenses of any kind." The Court held this portion of the injunction invalid "for the same reasons that the provision limiting fees is invalid." 401 U.S. at 585 n.9. Again, the Court's focus was again on the union's conduct. However, the Court's holding that the First Amendment bars a state from forbidding a union to inform members that attorneys may "defray expenses" implicitly suggests that states may not directly prohibit the attorneys from engaging in such activity. Significantly, Justice Harlan noted that "it is not generally improper for an attorney to make advances to clients." 401 U.S. at 597, 91 S. Ct. at 1087 (Harlan, J., dissenting in part).

The Court has also made it clear that the First Amendment Right of Petition precludes a state from eroding or burdening access to the courts through indirect means:

> We start with the premise that the rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights. . . . The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence

United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). Referring to its decision in *Trainmen*, the Court stated that, although "the States have broad power to regulate the practice of law," the dangers of baseless litigation and conflicts of interest were "distant" and "too speculative" to "justify a complete prohibition of the Trainmen's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries." Id. at 222-23.

As noted, this Court's strong language in defense of access to courts as safeguarded by the First Amendment Right of Petition occurs in cases involving state restrictions directed against union activity. ATLA suggests that the right of petition affords protections to civil litigants independent of the First Amendment rights of speech and assembly. Indeed, historically, the right of petition was viewed in 18th Century England and America as a separate right, afforded even greater protection than the rights of free speech and assembly, and the drafting of the Petition Clause of the First Amendment reflects this view. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government For A Redress of Grievances: Cut From A Different Cloth,* 21 Hastings L.Q. 15, 16 & 34-42 (1993).

The court below in this case, however, ruled that the First Amendment right of access to the courts enunciated in *Trainmen* does not exist outside the context of collective "group legal action." (Pet. at A-13)

ATLA urges the Court to grant the Petition to decide the important and unresolved scope of the rights of litigants under the Petition Clause of the First Amendment

D. The Prohibition Against Advancing Living Expenses Advances No Compelling State Interest and Lacks any Rational Relationship to State Objectives.

State law that "impinges" upon or "interferes" with a fundamental right, *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1972), or "touches on" a fundamental

right, *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969), is subject to strict constitutional scrutiny. Such intrusions on important rights may be upheld only if narrowly drawn and "necessary to promote a compelling governmental interest." 394 U.S. at 634

Three justifications are advanced in support of the prohibition: (1) The advance gives the attorney an improper financial stake in the client's claim, (2) the attorney is placed in a conflict of interest with the client, (3) permitting humanitarian loans will lead to improper solicitation of potential clients. See Advisory Opinion 288, *supra* n.2. Without conceding that these reasons rise to the level of compelling state interests, ATLA suggests that prohibiting advances of living expenses does not bear even the minimal rational relationship to those objectives.

1. Attorney's Stake. The fact that ARPC 1.8 (like Advisory Opinion 288) prohibits advances of living expenses while permitting advances of litigation expenses indicates that the state has no real interest in preventing attorneys from acquiring a stake in the outcome of litigation. In this case, for example, the court approved reimbursement to Markham for S.H.'s airfare to Alaska to assist in the case, yet disallowed repayment of a loan for S.H. to have a place to live while there. The attorney's financial stake was indistinguishable. Indeed, a contingency fee arrangement by definition gives the attorney a substantial stake in the case.

2. Conflict of Interest. A related argument is that the attorney's interest in securing repayment may lead counsel to settle a case for an inadequate amount, rather than risking losing at trial. There is a certain hypocrisy to the argument that a client is better off vulnerable to the pressure exerted by the defendant than to trust his or her own attorney to act in the client's interest.

The reality is that advising a client whether to accept a settlement offer or proceed to trial, is an important responsibility of the trial lawyer. If reimbursement of living expense loans creates a conflict of interest, it is surely

outweighed by reimbursement of expenses and the contingency fee itself.

3. Solicitation of Clients. In Amicus' view, it is not self-evident the state has a compelling interest in prohibiting truthful, non-deceptive disclosure that an attorney might make advances of living expenses where necessary to enable a client to pursue a claim. To an injured worker who can no longer provide for the family while the medical bills pile up, this may be as important a factor in choosing an attorney as the contingency fee rate or the advancement of litigation expenses.

In any event, the purported evil is improper solicitation, not the advancement of expenses itself. Any state interest should properly be addressed through the ethical rules regarding advertising and solicitation. A blanket prohibition against humanitarian loans bears no rational relationship to that interest.

The fact that the Alaska Supreme Court offered no justification for Rule 1.8, and indeed the "Bar Association concedes that the prohibition may not be justified," (Pet. at A-16) strongly suggests that there is no rational basis for the rule.

CONCLUSION

For the forgoing reasons, Amicus urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Jeffrey R. White

Association of Trial Lawyers
of America
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae

July 1, 1999